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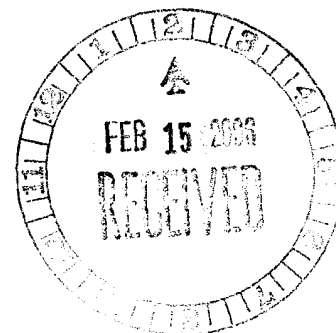
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February 15, 2006

Mr. Leland L. Gardner, Director
Office of Economics, Environmental Analysis and Administration
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423



Re: Carload Waybill Sample Request (WB456-1)

Dear Director Gardner:

The Association of American Railroads ("AAR") hereby submits its comments regarding the "Request for Release of Waybill Data" filed by two outside lawyers on behalf of the State of North Dakota. See Letter from N. DiMichael and A. Goldstein to Director Leland L. Gardner (Jan. 25, 2006) (the "Thompson Hine Request" or "Request"); 71 Fed. Reg. 5409 (Feb. 1, 2006) (STB notice of request WB456-1). AAR's members include all seven Class I railroads in North America, including the three railroads whose movements are the subject of the Thompson Hine Request.¹ All AAR members, including those whose data is not directly at issue in the present Request, have an interest in the confidentiality of Waybill Sample data, and in the terms and conditions under which any data from the Waybill Sample may be released by the STB. Because the disposition of this Request may set a precedent for future Waybill Sample requests, the AAR has a compelling interest in presenting its views concerning the Request.

The AAR strongly opposes the Thompson Hine Request, which seeks unprecedented access to highly sensitive and confidential revenue information that – for very good reason – the Board has never provided to any person outside the Board. Moreover, because no rate case has been filed, the Request is premature: any request for confidential Waybill Sample data to be used in a rate case should be considered only in the context of an actual pending case.

I. THE DIRECTOR SHOULD REJECT THE REQUEST BECAUSE IT SEEKS HIGHLY CONFIDENTIAL INFORMATION – SUBMITTED AND INTENDED SOLELY FOR THE USE OF THE BOARD – THAT THE BOARD HAS CONSISTENTLY REFUSED TO DISCLOSE TO ANY OUTSIDE REQUESTOR.

The Thompson Hine Request seeks highly confidential and competitively sensitive revenue information that has never been released for use by anyone other than the Board and a few selected members of its staff. Requestors' suggestion that "the Board has established a high

¹ This opposition letter expresses the views of the AAR. Individual rail carriers may also submit separate comments expressing their specific views or position concerning the Request.

standard for the release of Costed Waybill Data using unmasked revenues” (Request at 2) is an understatement: the Board has repeatedly held that the information Requestors seek – the Costed Waybill Sample with unmasked revenues and revenue masking factors – are intended for internal Board use only and will not be released to any person other than the Board and its staff. *See, e.g., B.P. Amoco Chemical Co. v. Norfolk Southern Ry Co.*, STB Doc. No. 42093 (June 8, 2005) (Director’s Decision) (releasing waybill sample, but denying request for unmasked revenues); *Duke Energy Corporation v. Norfolk Southern Railway Co.*, STB Doc. No. 42069 (served April 5, 2005).

When the Board uses the masking factors to conduct waybill sample analysis, it is generating its internal work product, intended solely for the Board’s regulatory and analytical purposes. Even if the revenue data were not highly confidential, there would be no reason for the Board to disclose such internal work papers and work product. Because railroad revenue data *are* highly confidential and extremely sensitive, revenue “masking factors have never been made available, and have never been intended to be made available to any person not on [the Board’s] staff.” *Conrail Waybill Decision*, STB Doc. No. 33388, Decision No. 42 at 6. Recently, when complainants asked the Board to reverse this longstanding policy – in actual pending rate cases brought under both the *Coal Rate Guidelines* and the *Modified Guidelines* – the Board flatly refused, reaffirming that its

long standing policy is that the unmasked revenues and the specific masking factors . . . are highly confidential, for internal Board use only, and not to be released to waybill users.

Duke Energy Corporation v. Norfolk Southern Railway Co., STB Doc. No. 42069 (served April 5, 2005) (emphasis added); *see B.P. Amoco*, Director’s Decision at 1 (releasing waybill sample with “only masked revenues, in conformance with standard [STB] procedures”).

The Board’s consistent policy of refusing to disclose unmasked revenues is necessary to protect the competitive interests of shippers and rail carriers. The release of such information to shippers, even indirectly, could cause significant commercial or competitive injury to other shippers and/or to the affected rail carrier(s). For example, information regarding the transportation rate(s) charged by a rail carrier to one shipper could be used by other shippers to obtain an unfair competitive or commercial advantage over the first shipper. Largely because of the potential harm to shippers that could result from the disclosure of confidential rate information, the Interstate Commerce Act expressly prohibits rail carriers from disclosing shipper-specific information to anyone other than the involved shipper or consignee. *See* 49 U.S.C. § 11904 (providing a fine of up to \$50,000 for violation of the statutory prohibition). Thus, the Board’s longstanding policy of refusing to disclose revenue masking factors to anyone other than Board staff is fully consistent with Congress’ intent to protect such information from public disclosure.

II. BECAUSE NO RATE CASE HAS BEEN FILED, THE REQUEST IS UNNECESSARY AND PREMATURE.

The Request also should be dismissed because it is not ripe for consideration. Requestors seek access to highly confidential Waybill Sample data to use it in a rate case, but they have not filed a rate case, nor even identified the shipper(s) on whose behalf they may file a case. When the Board adopted the *Modified Rate Guidelines*, it expressly held that access to the confidential Waybill Sample prior to the filing of a Complaint is both unnecessary and inappropriate. *See Rate Guidelines – Non-Coal Proceedings*, Ex Parte 347 (Sub No. 2), 1 S.T.B. 1004, 1054-55 (1997) (the “*Modified Guidelines*”).

In Ex Parte 347 (Sub-No. 2), the National Industrial Transportation League submitted comments arguing that the Board should make confidential Waybill Sample data available prior to the filing of a complaint, to allow shippers to determine whether to bring a complaint. *Modified Guidelines*, 1 S.T.B. 1004, 1054. In the final Decision adopting the revised guidelines, the Board expressly rejected such “release of confidential and commercially sensitive information absent an actual rate case,” explaining that such information was not necessary for the filing of a complaint:

[D]ata from the Waybill Sample is not needed for the information that must be included in the initial complaint. We agree with AAR that pre-complaint access to the confidential Waybill Sample is not only unnecessary, but would be an inappropriate use of the Waybill Sample . . .

Modified Guidelines, 1 S.T.B. 1004, 1054-55 (emphasis added).

Thus, the Board fully considered the issue of pre-complaint release of confidential Waybill Sample data, and rejected it as unnecessary and inappropriate. Even putting aside the question of access to unmasked revenues, the present Request for pre-complaint access to confidential Waybill Sample data is precluded by clear and unequivocal Board precedent. For this reason alone, the Director should deny the Request in its entirety.

III. THE BOARD’S WAYBILL REGULATIONS DO NOT PROVIDE FOR RELEASE OF THE REQUESTED WAYBILL SAMPLE DATA, AND REQUESTORS PROVIDE NO REASON TO CREATE A NEW EXCEPTION TO THOSE REGULATIONS.

Consistent with Board policy and practice, Waybill Sample regulations do not provide for the release of unmasked revenues to any requestor under any circumstances. Although the Board’s regulations contain several provisions concerning rail carriers’ use and application of revenue masking factors, they make no mention whatsoever of a procedure for any requestor – not even another federal agency – to seek disclosure of unmasked revenues or masking factors.

Compare 49 C.F.R. § 1244.3(b) with *id.* § 1244.9(a).² The lack of any mention – let alone authorization for the release – of unmasked revenues in the governing regulations confirms the Board’s longstanding policy of maintaining revenue masking factors solely for the Board’s internal use. *See Conrail Waybill Decision* at 7, n.24 (noting, in support of the Board’s finding that its Part 1244 regulations do not allow release of unmasked revenue data, that “those regulations do not even reference the masking factors.”).

Moreover, the Board’s regulations and policies do not permit the release of Confidential Waybill Sample data (*i.e.* non-public Waybill Sample data with masked revenues) under the present circumstances, or for the purposes described in the Request. Perhaps recognizing that the regulations that specifically apply to requests by States and transportation lawyers (49 C.F.R. §§ 1244.9(b)(3) & (4)) do not authorize the release of Confidential Waybill Sample data for the purposes for which Requestors seek to use it, they have framed their request as a submission by “other users.” Thompson Hine Request at 1 (citing 49 C.F.R. § 1244.9(c)). The “other users” provision, however, does not authorize broader access to the Waybill Sample data, or afford less protection for confidential Waybill Sample information. As explained below, the reasons proffered in support of the Request simply do not justify the creation of an exception to the Board’s longstanding rules, policies, and regulations regarding Waybill Sample access and confidentiality.

First, Requestors assert that they should be granted access to the full Waybill Sample with unmasked revenues (the “Unmasked Waybill Sample”) because of “the identity of the requesting parties,” *i.e.*, because the requesting parties are not shippers but rather a State government and its outside shipper lawyers. *See* Request at 2. What is important, however, is not the nominal identity of the persons submitting the request, but rather on whose behalf they are making the request and what use they intend to make of any data supplied in response to the request. Thus, Requestors’ assertion regarding their identity is incomplete because it fails to note that the Requestors are acting *on behalf of* one or more unidentified shippers, seeking to obtain shipper-specific and rail carrier-specific data to be used in the evaluation, filing, and prosecution of a rate case on behalf of those shippers. *See id.* at 2-6.³

² To the contrary, when the ICC adopted regulations governing waybill access (including the authorization of use of revenue masking factors) it emphasized that a primary aim of those regulations was “to establish tighter control over the release of waybill data.” *See Procedures on Release of Data from the ICC [now STB] Waybill Sample*, at 1, Ex Parte No. 385 (Sub-No. 2), 4 I.C.C.2d 194 (March 31, 1987).

³ North Dakota and its lawyers do not assert that they wish to use the data for transportation planning (or other state-government purpose) or for any purpose other than to determine whether to bring a rate case and which movement(s), shipper(s), and rail carrier(s) such a case should involve. *See id.* The purpose of the Request is to advance the interests of persons and businesses that ship goods or commodities (e.g. wheat) by rail from (or through) the State of North Dakota.

Because the Requestors are, ultimately, acting on behalf of private business entities for the express purpose of facilitating the filing of a rate case on their behalf, the Request is no different from one directly made by one or more shippers, and it should be considered and determined under the standards the Board applies to Waybill Sample requests by individual shippers. The fact that the Request was submitted – on behalf of unidentified shippers – at the behest of a State government does not warrant any exception to the Board’s regulations and its longstanding precedent of refusing to release highly sensitive revenue masking factors or unmasked revenues.

Second, Requestors state that the purpose for which they seek the Unmasked Waybill Sample – to evaluate rates charged to various shippers and to file and prosecute a rate case – justifies their exceptional request. Request at 2. This argument proves too much. Every shipper (or person acting on a shipper’s behalf) requesting an Unmasked Waybill Sample could make precisely this same argument. Moreover, in the present instance, the Requestors have not even identified a specific shipper or movement whose rates they wish to investigate, or even (with respect to one railroad) narrowed their request to a specific commodity. Instead, they seek to use the Unmasked Waybill Sample to engage in a broad fishing expedition, designed to locate and identify shippers and movements that might be candidates for a rate case. Such a broad-gauge search for prospective rate complainants could not justify the release of confidential Waybill Sample data with *masked* revenues, let alone the unprecedented release of Unmasked Waybill Samples. *See Modified Guidelines*, 1 S.T.B. 1004, 1054-55.

Third, Requestors assert that the information they seek would be “directly relevant” to matters at issue in a case brought under the *Modified Rate Guidelines*. *Id.* at 3-6. This puts the cart before the horse. A rate complainant must first file a case, and then demonstrate that its case is eligible and appropriate for consideration under the *Modified Guidelines*. If, and only if, the Board agrees to consider the case under those *Guidelines*, the complainant may seek discovery regarding matters relevant to those *Guidelines*’ application to a specific case. *See Modified Guidelines*, 1 S.T.B. 1004, 1054-55 (rejecting proposal that shippers be allowed access to confidential Waybill Sample data prior to the filing of a rate complaint). Moreover, relevance is case- and claim-specific – it cannot be determined in the abstract. Unless and until a complaint concerning a specific shipper and a specific movement has been filed (and approved for consideration under the *Modified Guidelines*), there is no basis to determine the relevance of any particular information.

The type of information Requestors seek should only be sought, if at all, through discovery requests that are narrowly tailored to the facts and issues presented in a specific case, not in a pre-filing fishing expedition seeking movements that counsel and consultants think might support a rate case. In the context of an actual case, the Board may evaluate the potential relevance of requested information and weigh that relevance against the competitive interests of other shippers and rail carriers and the burden of production and make a fact-based determination of the proper subjects and scope of discovery.

Fourth, Requestors assert that they should be allowed access to the Unmasked Waybill Sample because of their efforts to “narrow the request and the persons to whom the information will be made available.” In fact, the Request is substantially overbroad. Moreover, the Request does not adequately provide for maintenance of the confidentiality of Waybill Sample data, or ensure that access to, or use of, the data would be confined to a narrow group of people. The Request does not list the specific persons who would be given access to the requested data and does not provide adequate assurances that the information will be used solely by those persons and solely for the purposes of the intended rate case.⁴

The outside transportation lawyers who submitted the Request suggest that the Board need not be concerned about the confidentiality constraints and requirements that typically apply to Waybill Sample requests, because they have been deputized to act for purposes of this request as “Special Assistant Attorneys General” for the State of North Dakota. *See* Thompson Hine Request at 2. Those requesting lawyers have not stated, however, that they (or any consultants retained to review Waybill Sample data) would not represent a shipper in any proceeding that might result from their analysis of the requested Waybill Sample; nor that they would not advise a shipper considering a possible rate case based on information obtained from that confidential waybill sample; nor that they would take adequate measures to ensure that any confidential information they learn about individual shippers, rates, or railroads is not disclosed to other shippers, other railroads, or the public. Moreover, regardless of the capacity in which the requesting lawyers are acting with respect to this specific request, they regularly advise, and act on behalf of, rail shippers – they would retain confidential information, data and knowledge they obtain from the requested waybill sample and such information would inevitably influence and inform the advice they provide to shippers regarding rail rates, terms and conditions.

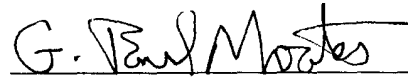
Even if the Board were to issue a very narrow and rigorous confidentiality order regarding the release of unmasked revenues or masking factors and confining their use to one specific purpose or case, it would be impossible for the shipper lawyers and consultants who review that information to erase the information from their minds. As a result, future analyses and advice providing by those lawyers and consultants to other shippers inevitably would be informed by the confidential revenue data, which could result in competitive injury to rail carriers and to other shippers.

⁴ With regard to measures to protect the confidentiality of the requested information, the Request simply states that the requesting lawyers “would be willing to enter into a protective order restricting the use of this information . . . solely by outside counsel and outside consultants involved in such a complaint” Request at 7. This statement is insufficient. A declaration of prospective willingness to enter a hypothetical and indefinite future protective order provides no meaningful present protection of the data’s confidentiality.

For all of the foregoing reasons, the AAR respectfully requests that Waybill Request No. 456-1 be denied in its entirety.

Respectfully Submitted,

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